

The Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BOMBARDIER, INC.,)	
)	NO. 2:18-cv-1543JLR
Plaintiff,)	
)	
v.)	AEROTEC DEFENDANTS'
)	REPLY TO BOMBARDIER'S
MITSUBISHI AIRCRAFT CORPORATION,)	RESPONSE TO AEROTEC'S
et al.,)	MOTION TO SEAL
)	
Defendants.)	
)	Noted on Motion Calendar:
)	January 18, 2019
)	
)	
)	

After forcing the AeroTEC Defendants to meet and confer, and insisting that they file a motion to seal, a redacted preliminary injunction opposition brief, and the Declarations of Laurus Basson and Cindy Dornéval under seal in their entirety, Plaintiff now concedes in its Response that the redactions and sealed filings were not warranted, with the minor exception of two innocuous sentences of Basson's Declaration (the "Basson Redactions"). The fact that Plaintiff now back-pedals and withdraws its baseless demands is not surprising, as the sealed information is so obviously not confidential or sensitive that the AeroTEC Defendants predicted Plaintiff would be unable to rationally justify their designations. What is surprising is that Plaintiff asserted its original position at all. The AeroTEC Defendants submit that even the newly proposed Basson Redactions are unwarranted, and the entire Basson Declaration should be unsealed and made

1 available for public view.

2 **1. Plaintiff's Initial Redaction Demands Were Unwarranted.**

3 In this case, Plaintiff accuses the AeroTEC Defendants of misappropriating trade secret
4 documents. The allegations have been reported in the news and are damaging to AeroTEC
5 Defendants' reputation. The AeroTEC Defendants continue to assert that none of the documents
6 contain any trade secret information, and the Basson and Dornéval Declarations explain why. They
7 nonetheless acquiesced to Plaintiff's insistence that the Basson and Dornéval Declaration be filed
8 under seal just because they mentioned the documents. As confirmed by Plaintiff's Response, there
9 was no reasonable basis for Plaintiff's position. Plaintiff now concedes that the entire Dornéval
10 Declaration can be unsealed, along with everything but two sentences in the Basson Declaration.

11 Plaintiff's now-withdrawn but still absurd demands for redaction are representative of its
12 exaggerated position, which appears to be that practically *everything* related to Plaintiff is a trade
13 secret. To sharpen this point, below is a list of the portions from the AeroTEC Defendants'
14 Opposition to Plaintiff's Motion for Preliminary Injunction, which Plaintiff claimed to require
15 redactions because they constituted "trade secrets":

- 16 • "The documents, filed under seal as Exhibits A and B to the Declaration of Daniel Burns,
17 were drafts of a presentation Basson had been working on to present Bombardier's
18 proposed certification of the Global 7000/8000 aircraft's Skew Detection System to
19 Canada's aircraft regulatory agency, Transport Canada Civil Aviation ("TCCA"). Basson
20 Decl., ¶ 12." Dkt. # 61 at 4-5.
- 21 • "Bombardier's SDS technology is generic, and would have no value or relevance to the
22 design or certification of the MRJ, which uses a completely different skew system. *Id.* at
23 22. This is confirmed by experts retained by MITAC-A. *See* the Declaration of Robert John
24 Hansman Jr., ¶ 44 and the Declaration of Stephen Boyd, ¶ 64." *Id.* at 5.
- 25 • "See Complaint Exhibits O and Q." *Id.* at 6.
- 26 • "The November 2016 email had two identical Flight Test Procedure documents attached.
27 *See* Complaint Exh. O." *Id.*
- "Bombardier's cruise performance procedures (comprising 5 pages of the document) had
recently changed, and Dornéval wanted to study them to prepare for the test flight." *Id.*

- 1 • “Moreover, as with the other Documents, the test points and flight conditions information
2 contained in the two documents were specific to the CSeries aircraft, and inapplicable to
3 the MRJ or any other aircraft. *Id.*; *see also* Boyd Decl., ¶ 68; Hansman Decl. ¶54 (the
4 information is specific to Bombardier’s plane and not useful or at best insignificant to
5 certification of the MRJ).” *Id.*
- 6 • “Computerized Airplane Flight Manual (CAFM) calculation methodology saved as
7 “BM7002.02.15.02 – Flight Performance.pdf.” *Id.*
- 8 • A reference to the Tidd Declaration’s Exhibit “A.” *Id.*
- 9 • “The equations and information are generic, applicable to any aircraft design, commonly
10 known to aircraft engineers, and publicly available. *Id.*; Hansman Decl., ¶¶ 40, 43; Boyd
11 Decl., ¶ 69. That version of the CAFM methodology did not contain any updates of
12 information specific to the CSeries aircraft, which did not exist in 2007. *Id.*; Hansman
13 Decl., ¶¶ 43, 54; Boyd Decl., ¶ 69.” *Id.*
- 14 • A reference to the Complaint’s Exhibit “Q.” *Id.* at 7.
- 15 • A reference to “Boyd Decl, ¶¶ 65-67; Hansman Decl. ¶¶ 25, 52-54.” *Id.*
- 16 • “For example, the Flight Test Procedures document Dornéval emailed to herself in
17 November 2016 (Burns Decl., Exhs. I & J), broadly outlines generic test check points that
18 flight test personnel would evaluate for CSeries flight tests. Hansman Decl., ¶ 52. The
19 document is largely a form, however, with blanks for specific results to be completed
20 during the flight tests.” *Id.* at 12-13.
- 21 • “It has no application to other aircraft, and would not have given any competitive advantage
22 to the defendants working on MRJ flight tests. Hansman Decl., ¶ 52; Boyd Decl., ¶ 68.”
23 *Id.* at 13.
- 24 • “CAFM Methodology (Tidd Decl., Exh. A)” *Id.*
- 25 • “The information is not specific to Bombardier or the CSeries. Hansman Decl., ¶¶ 50, 43;
26 Boyd Decl., ¶ 68.” *Id.*
- 27 • A reference to “Hansman Decl., ¶ 39; Boyd Decl., ¶¶ 43.” *Id.*
- “While the Boyd Declaration at paragraph 55 acknowledges that specific algorithms and
computational approaches in the CAFM *software* might be confidential, the version in the
zip file attached to Dornéval’s February 2017 email was a .pdf copy only. (Complaint, Exh.
Q, page 2 of 9).” *Id.* at 13 fn. 8.

As is immediately clear from even a cursory reading of the above, *none* of the text Plaintiff specifically demanded be redacted can reasonably be viewed as sensitive or confidential. The demanded redactions include legal arguments, publicly available information (including from

1 Plaintiff's own filings), and perhaps most perplexingly, mere references to other documents or
 2 even single exhibit letters. Plaintiff now appears to admit it. There is no excuse for demanding the
 3 AeroTEC Defendants file an unnecessary motion to seal at their own expense. Plaintiff's efforts
 4 to ensure the AeroTEC Defendants' opposition brief was peppered with random redactions has
 5 more to do with bolstering their case for trade secret misappropriation in the eyes of the public
 6 than it does protecting such alleged secrets.

7 **2. The Two Sentences Plaintiff Now Claims Should be Redacted are Not Confidential or**
 8 **Sensitive in Any Way.**

9 Realizing it would be unable to rationally justify their designations in the face of strong
 10 opposition, Plaintiff has now backed off from all but one of their demands. Trying to save face,
 11 Plaintiff insists that two sentences in Basson's Declaration still merit redaction. Plaintiff has failed
 12 to meet its burden of overcoming the strong presumption of public access.

13 Plaintiff claims it need only establish "good cause" for its designations because its
 14 preliminary injunction motion is non-dispositive, and not "compelling reasons" as required for
 15 dispositive motions, citing *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1180-81
 16 (9th Cir. 2006). But the Ninth Circuit has disapproved of this "'binary' approach based on
 17 'mechanical classifications[.]'" *Cohen v. Trump*, No. 13-cv-2519-GPC-WVG, 2016 U.S. Dist.
 18 LEXIS 69985, at *10 (S.D. Cal. May 27, 2016), citing *Center for Auto Safety v. Chrysler Grp.,*
 19 *LLC*, 809 F.3d 1098 (9th Cir. 2016). The Ninth Circuit has departed from the rigid reasoning of
 20 *Kamakana*, and now requires analysis of whether information is "tangentially related to the
 21 underlying cause of action." *Id.* at *9. Because the AeroTEC Defendants' preliminary injunction
 22 opposition is "strongly correlative to the merits of a case," they are not "tangential," and thus, the
 23 higher standard of "compelling reasons" applies to this dispute.

24 Under the compelling reasons test, "a strong presumption in favor of [public] access is the
 25 starting point." *Cohen*, 2016 U.S. Dist. LEXIS 69985, at *11. "A party seeking to seal a judicial
 26 record . . . bears the burden of overcoming this presumption by . . . articulat[ing] compelling
 27 reasons supported by specific factual findings . . . that outweigh the general history of access and

1 the public policies favoring disclosure.” *Id.* “[B]lanket assertions as to why disputed materials
2 constitute trade secrets” are not good enough. *Id.* at *16.

3 Plaintiff seeks redaction of a preliminary injunction opposition declaration due to the
4 alleged threat of trade secrets within the Basson Redactions being revealed to the public. This cuts
5 to the heart of this litigation, because the AeroTEC Defendants assert that the documents at issue
6 contain no such trade secrets. The Basson Redactions appear random and arbitrary. The only
7 reasons given for the redaction are that the information is not “publicly available,” that “Basson
8 was aware of it only through his employment,” and it is “self-evidently proprietary.” None of these
9 alleged facts, even if true, constitute “good cause” or “compelling reasons” for the Basson
10 Redactions.

11 The first sentence of the Basson Redactions relates to a simple fact that it is public
12 knowledge. *See e.g.*, FAA Order 8110.4C, Type Certification (“All [Type Certificate] applicants
13 are required to submit a certification plan to the FAA and to keep it current throughout the
14 project”).¹ The second redacted sentence contains no design details of any kind. In fact, the
15 sentences immediately following the Basson Redactions explicitly mention essentially the same
16 facts, yet Plaintiff has not demanded their redaction. The claim that the Basson Redactions contain
17 sensitive or proprietary information strains credulity, and is as unwarranted as the other demands
18 for redaction originally made by Plaintiff. Once again, the random and inexplicable demand to
19 shield the Basson Redactions from public view appears to be more of a face saving maneuver than
20 a serious concern, and the Court should reject it as such.

21 Pursuant to Plaintiff’s consent, this Court should unseal the AeroTEC Defendant’s
22 unredacted preliminary injunction opposition (Dkt. # 61), the Dornéval Declaration and Exhibits
23 (Dkt. # 64), and Exhibit C to the Basson Declaration (Dkt. # 63). And because Plaintiff has failed
24 to establish the propriety of the Basson Redactions, the Court should also unseal the unredacted
25 Basson Declaration and attached exhibits (Dkt. # 62). Plaintiff’s arguments to shield the innocuous
26 statements in the Basson Redactions from public access are unreasonable and meritless. All of the

27 ¹ See https://www.faa.gov/documentLibrary/media/Order/FAA_Order_8110_4C_Chg_6.pdf, at p.21.

1 AeroTEC Defendant's sealed filings should be unsealed without redaction in their entirety.

2 Dated this 18th day of January, 2019.

3 **KARR TUTTLE CAMPBELL**

4 *Attorneys for Defendants AeroTEC, Basson,*
5 *Dornéval and Korwin-Szymanowski*

6 /s/ Richard J. Omata

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CERTIFICATE OF SERVICE

I, Sherelyn Anderson, affirm and state that I am employed by Karr Tuttle Campbell in King County, in the State of Washington. I am over the age of 18 and not a party to the within action. My business address is: 701 Fifth Avenue, Suite 3300, Seattle, Washington 98104. On this day, I electronically filed the foregoing AeroTEC Defendants' Reply to Bombardier's Response to Aerotec's Motion to Seal with the Clerk of the Court and caused it to be served upon the below counsel of record using the CM/ECF system.

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I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, to the best of my knowledge.

Dated this 18th day of January, 2019, at Seattle, Washington.

/s/ Sherelyn Anderson

Sherelyn Anderson
 Litigation Legal Assistant